

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>MICHAEL WEBER,</b>	:	<b>Case No. 08CV2845</b>
<b>Plaintiff,</b>	:	
	:	<b>JUDGE KATHLEEN O'MALLEY</b>
<b>v.</b>	:	
<b>J.C. PENNY CORP., INC., et al.,</b>	:	<b><u>ORDER</u></b>
<b>Defendants.</b>	:	

On April 13, 2010 the Court held a telephonic discovery conference regarding certain email messages identified by the Defendants as privileged attorney-client communications and/or work product. (*See* Doc. 32.) At the discovery conference, and in the minutes that followed, the Court ordered the Defendants to re-submit the privilege log and documents identified for *in camera* review because the initial submission did not describe the position/capacity of the individuals who sent and received the emails at issue, and the email messages themselves were not sufficiently described and organized to allow the Court to effectively assess whether the message in question was within the attorney-client privilege or work product doctrine. In addition, the Court granted the Plaintiff's request to file a letter brief setting forth the Plaintiff's argument that the email messages identified must be produced in discovery. The Defendants have now re-submitted the documents for *in camera* review and the Plaintiff has filed his letter brief.

***The Defendants' Re-Submission***

The Defendants' re-submission does not cure the deficiencies discussed at the April 13<sup>th</sup>

discovery conference. For example:

- Although the cover letter to the re-submission lists the positions of the senders and recipients of the email messages in question, the very first message raises an obvious discrepancy between the list and the message: Kathleen Winti is listed as an attorney for outside counsel in the cover letter and a member of the JCPenny Human Resources Benefits Department in the email message;
- The Defendants have used gray divider pages with numbers corresponding to some of the messages listed on the privilege log to separate the messages, but the basis of the divider system (e.g., why one divider does not have a number and why some of the numbers on the privilege log do not appear on any divider) is not apparent to the Court and was not explained in the cover letter;
- The cover letter explains that the messages highlighted in yellow “identify the specific documents Defendants claim as protected attorney-client communications and/or work product[,]” however, the first highlighted message does not appear on the privilege log;
- It is still unclear if and when the Defendants are asserting privilege with respect to all of the messages in a chain of emails.

While the Court recognizes that there may be simple explanations for these apparent problems, no such explanations have been provided, and, ultimately, the re-submission does not address the primary thrust of the Court’s order following the discovery conference – that the Defendant “make every effort to facilitate the Court’s review of the documents submitted.” (Doc. 32.) Accordingly, unless the Defendant re-submits the documents for *in camera* review in a manner that allows the Court to efficiently and effectively assess each of the elements of the asserted privilege with respect to each email message individually (or each chain of email messages individually), the Court will order all of the documents to be produced for failure to support the assertion that they are privileged. The Court therefore **ORDERS** the Defendant to re-submit the email messages in question in a manner consistent with this Order. If the Defendants fail to do so within ten (10) calendar days of the date of this Order, the Court will order the Defendants to produce all of the email messages in question.

***Response to the Plaintiff's Letter Brief***

Further, the Court **ORDERS** the Defendants to file a brief in response to the Plaintiff's letter brief of April 16, 2010 within ten (10) calendar days of the date of this Order. (Doc. 33.) The response brief must address the legal authority cited in the Plaintiff's letter brief as applied to the claims, defenses, facts, and circumstances of this case.

**IT IS SO ORDERED.**

**s/Kathleen M. O'Malley**  
**KATHLEEN McDONALD O'MALLEY**  
**UNITED STATES DISTRICT JUDGE**

**Dated: April 20, 2010**